IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 28, 2009

STATE OF TENNESSEE v. THOMAS LESTER CAMPBELL

Appeal from the Circuit Court for Sevier County
No. 11783-III Rex Henry Ogle, Judge

No. E2008-02751-CCA-R3-CD - Filed August 20, 2009

The defendant, Thomas Lester Campbell, challenges the Sevier County Circuit Court's denial of his motion to withdraw his guilty plea to driving under the influence of an intoxicant. The defendant argues that he was "rushed into taking the plea," that he was denied the effective assistance of counsel in determining whether to accept the plea agreement, that he was misled by the prosecutor, and that the plea resulted from "collaboration between the [p]ublic [d]efender and the State." The defendant further argues that the trial court erred by not determining a factual basis in accepting the plea and by not identifying the defendant's plea as an *Alford* plea.[1] Discerning no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

James R. Hickman, Jr., Sevierville, Tennessee (on appeal and at motion hearing); and Amber Haas, Assistant District Public Defender (at plea hearing), for the appellant, Thomas Lester Campbell.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; James B. Dunn, District Attorney General; and George Ioannides, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Introduction

This case stems from the defendant's December 18, 2005 arrest in Sevier County. According to the facts gleaned from the plea hearing, Officer Wes Rutherford of the Sevier County

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[1] The defendant refers to *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970), wherein the United States Supreme Court held that a criminal defendant may enter a guilty plea without admitting guilt if the defendant intelligently concludes that his best interests would be served by a plea of guilty.

Sheriff's Department observed the defendant "operating a red Camaro erratically." Officer Rutherford approached the defendant after he stopped his vehicle at a gas station and found the defendant "to be highly impaired." He asked the defendant to exit the vehicle and noted that the defendant was "clearly unsteady on his feet" and that his speech was slurred. Officer Rutherford found a pill and other drug paraphernalia. A blood alcohol test analysis showed no alcohol, but it reflected cocaine, Valium, Valium metabolite, and oxycodone in the defendant's bloodstream. The oxycodone concentration in the defendant's bloodstream exceeded the therapeutic dosage by a multiple of four.

On September 27, 2006, a Sevier County grand jury indicted the defendant for one count of possession of a controlled substance with two prior drug convictions, *see* T.C.A. § 39-17-418 (2006), one count of driving under the influence of an intoxicant ("DUI"), *see id.* § 55-10-401, and one count of possession of drug paraphernalia, *see id.* § 39-17-425. The State moved to amend the indictment on June 30, 2008, to alter count one to simple possession of a controlled substance because the defendant had not been convicted on two previous drug charges. On September 12, 2008, the trial court dismissed Counts I and III, leaving only the DUI charge.

On October 9, 2008, the defendant signed a waiver of jury trial and a guilty plea on the DUI which reflected that the State agreed to recommend a sentence of 11 months, 29 days to be suspended upon service of 48 hours' incarceration. The plea agreement required a one-year loss of the defendant's driver's license, attendance at DUI school, compliance with recommendations from a drug and alcohol assessment, payment of a $350 fine, and completion of 40 hours of public service work.

Plea Hearing

At the October 9, 2008 plea hearing, the trial court informed the defendant of his presumption of innocence, right to a trial by jury, right to appeal, and the consequences of pleading guilty. The trial court explained that the defendant should not rely on any statement except for his plea agreement and that his plea must be voluntary. During the hearing, the following exchange occurred,

> THE COURT: Did the [c]ourt explain [the advice of rights] to your satisfaction?
>
> THE DEFENDANT: Yeah. I just -- I'm just doing it under duress, but yeah.
>
> THE COURT: You're what?
>
> THE DEFENDANT: I'm -- yeah.
>
> THE COURT: No, wait a minute. What's the duress?
>
> THE DEFENDANT: I'm just -- I just -- yes.

THE COURT: Wait a minute.

THE DEFENDANT: I plead guilty.

THE COURT: Well, whoa.

THE DEFENDANT: I just --

THE COURT: Whoa. Let's talk about --

THE DEFENDANT: I just hate pleading guilty to something I didn't do and in the plea agreement I have to agree with because of the --

THE COURT: You don't have to agree with anything.

THE DEFENDANT: I know.

THE COURT: You can go to trial. Now look --

THE DEFENDANT: I'm that far from doing it, but I just --

THE COURT: Pardon?

THE DEFENDANT: I agree. I went ahead and agreed with this.

THE COURT: Let me ask you this. I mean, is anybody making you do this?

THE DEFENDANT: No, sir, just myself.

THE COURT: Okay. So am I free to assume that you're doing this because of the risk you would face if you went to a trial and were convicted and sentencing and all those sorts of things?

THE DEFENDANT: Probably.

THE COURT: Okay, sir. Do you feel pressured by the [c]ourt to enter a plea?

THE DEFENDANT: No, it's just I've prepared for this and I know I'm innocent of it and I just -- you know, I was going to have to end up defending myself in this deal and I thought maybe that wasn't a good idea but I don't think I was left -- I had really much -- no choice in the matter.

THE COURT: Why is that?

THE DEFENDANT: I just didn't feel like [the public defender] had enough time to put on a good defense and there's a lot to this. You know, there's a lot of medical problems that I've had that led to this situation.

THE COURT: Well, and --

THE DEFENDANT: So I've decided to go ahead with [the prosecutor's] plea.

THE COURT: Let me say this to you. Well, as you know, if you were under the influence of even legal drugs --

THE DEFENDANT: Uh-huh.

THE COURT: -- that you still could be found guilty of DUI?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And again, now if you were convicted, your medical history would be taken into consideration by the judge --

THE DEFENDANT: Right.

THE COURT: -- as to what sentence I would give you.

. . . .

THE COURT: The sentence that you are receiving, however, except for the forty hours of community service, which I think is fine, and the DUI school is mandatory, everything else is mandatory minimum.

THE DEFENDANT: Right. I agree. That's why I'm taking it.

. . . .

THE COURT: Now, generally, most DUI cases are fairly simple questions of fact. If you were taking something, even lawful drugs, but that impaired your ability to drive --

THE DEFENDANT: Yes, sir.

THE COURT: -- you could be found guilty of DUI.

THE DEFENDANT: Yes, sir.

THE COURT: What are the allegations of what he was consuming?

[THE PROSECUTOR]: Your Honor, there was a blood test. It was negative for alcohol, positive for cocaine, Oxycodone and Valium as well as the Valium metabolite. The [Tennessee Bureau of Investigation] agent that I had subpoenaed and prepared for trial would testify that the Oxycodone level in the defendant's blood was four times the therapeutic level. So I think there's ample evidence here to sustain an impairment, a finding of impairment by the jury.

[DEFENSE COUNSEL]: In response to that, Your Honor, [the defendant] informed me that he had prescriptions for the Oxycodone.

THE COURT: Yes.

[DEFENSE COUNSEL]: However, obviously there was no prescription for cocaine. And I think taking that into -- he took all those matters into consideration in making this plea agreement.

THE COURT: Is that right, sir?

THE DEFENDANT: Yes, sir.

The prosecutor explained that the defendant's attorney had "done quite a bit of work on this case" that had resulted in the dismissal of Counts I and III and "a minimum plea." The court continued,

THE COURT: . . . I'm not saying a jury would find you guilty or not guilty. All I'm saying is if they found you guilty, I think assuming what has been said, and I have no reason to doubt what [the prosecutor] has told me about what his proof would be --

THE DEFENDANT: Right.

THE COURT: -- but I think there would be sufficient grounds depending on what the officers saw and so forth that a jury could convict you. Now, they might not --

THE DEFENDANT: Right.

THE COURT: -- but we don't know.

THE DEFENDANT: Right. That's why I've agreed to the plea.

THE COURT: Okay, sir. Now, is this the plea that you understood was going to be announced?

THE DEFENDANT: Yes, Your Honor.

. . . .

THE COURT: Do you feel like you've been treated fairly here?

THE DEFENDANT: Yes, sir.

THE COURT: Based upon that, sir, do you freely and voluntarily waive your right to a trial by jury and plead guilty to DUI, first?

THE DEFENDANT: Yes.

The court found the defendant guilty of DUI, first offense, and sentenced the defendant as recommended by his plea agreement. The court's judgment, filed October 13, 2008, reflected acceptance of the guilty plea and the recommended sentence.

Defendant's Effective Motion to Withdraw Guilty Plea

On October 27, 2008, the defendant filed a pro se "Motion for Judgment of a Grievance and Motion for Judgment of Acquital [sic] of All Charges." The motion alleged that the State's prosecutor approached the defendant at approximately 8:50 a.m. on October 9, 2008, and informed the defendant that the prosecuting law enforcement officer had misplaced the evidence for Counts I and III (illegal possession of a schedule II narcotic and drug paraphernalia). The motion asserted that the prosecutor "told [the defendant] he will throw those two counts if [he would] plead guilty to Charge II, DUI." It alleged that the defendant's attorney would not allow him to ask the prosecutor questions and that the prosecutor informed the defendant of "all of the stipulated punishment and other requirements of probation for DUI." The motion further alleged that the prosecutor informed the defendant that he would pursue "full punishment of 11 months and 29 days" for all three counts and that a toxicology report indicated that the defendant's blood concentration reflected cocaine and four times the therapeutic dose of oxycodone. It stated that the prosecutor told the defendant that the State would call a laboratory technician to testify that the oxycodone "would cause [his] impairment."

The defendant, through his motion, argued that his counsel told him that he "was running out of time and that the [j]udge was about to enter the court" and that he told counsel that he "needed to call [his] legal advisor." He then called his father, who lived in Memphis, but could only speak with him for approximately two minutes, and he accepted the plea offer "just before" entering the court room. The motion further alleged that defense counsel then approached him with "papers in her hand" that she asked him to sign without permitting him to review the documents.

The defendant's motion complained that the prosecutor was "threatening and intimidating," that the prosecutor's statements regarding the toxicology report and technician testimony were misleading, that he was not given sufficient time to consider the plea offer, and that Counts I and III would have been dismissed regardless of his pleading guilty. The motion characterized his plea agreement as "obviously preplanned" and "a collaborative effort" between his counsel and the State.

The trial court determined that the defendant's motion amounted to a motion to withdraw his guilty plea. *See* Tenn. R. Crim. P. 32(f). On November 6, 2008, the trial court appointed the defendant's present appellate counsel to aid with the defendant's motion.

Motion Hearing

The trial court held a motion hearing on November 17, 2008, to determine whether to allow the defendant to withdraw his October 9, 2008 plea. The defendant argued that he should be permitted to withdraw his plea in light of his new understanding of his possible defense. Defense counsel argued that the trace amounts of cocaine found in the defendant's blood stream did not affect the defendant's ability to drive. He further argued that the defendant's body metabolized drugs in a unique fashion, explaining the high level of oxycodone.

The defendant testified that, when he was arrested in December 2005, the officers would not inform him of the charges he faced and that they first refused him the opportunity to take a blood alcohol test. He testified that he had taken medication for 16 years for a back injury and that he knew that the blood test results would show the presence of oxycodone and a muscle relaxer. He explained that his body builds a tolerance against oxycodone, so his doctors increase his dosage. The defendant explained the presence of cocaine in his system by testifying that the night before his arrest he had "t[aken] two hits off a joint" that had cocaine laced in the marijuana.

The defendant testified that he was "apprehensive" about the plea offer and that he "was given no time to make a decision." Although he admitted that the court "let[] [him] know perfectly what [was] going on," he argued that he felt "badgered and threatened" by his attorney and the prosecutor. He testified that the plea agreement was only offered to him five minutes prior to his scheduled trial and that his attorney told him that he had to "hurry" in deciding to accept the plea. He testified that he was not able to speak with his attorney regarding the plea outside of the presence of the prosecutor. The defendant complained, "I just felt like I didn't have the time to think it over and I wasn't given any kind of counsel, what repercussions there would be, what my choices would be, what could happen if I went to court and got found guilty . . . ." He said, "I just didn't know what to do . . . ."

On cross-examination, the defendant admitted that he had attended college for pre-medical training and electronic engineering and that he had taught courses on electronics at the National Burglar and Fire Alarm Association. He stated that he and his father owned a "security company, electronics company." He maintained that he regretted the guilty plea.

The trial court recognized that the defendant had "some issues" with the plea but noted that the court continually explained and advised the defendant during the plea hearing. The court noted the defendant's education and experience and stated that the defendant "is obviously a man of significant intelligence." The court concluded, "I honestly don't know any more that I could have done other than just telling [the defendant] not to take the plea agreement." The trial court overruled the motion to withdraw the guilty plea and filed a written order denying the motion. The defendant filed a timely notice of appeal.

Issues on Appeal

On appeal, the defendant first argues that the trial court erred by refusing to set aside the guilty plea. Secondly, the defendant argues that the trial court erred "by accepting a guilty plea wherein the [defendant] did not make an announced 'best interest' plea and wherein the [defendant] made no factual allocution."

I. Withdraw of Guilty Plea

The defendant argues that he was "rushed into" accepting the guilty plea offer and that he "was given no opportunity to discuss the plea with counsel." He further argues that the prosecutor misled him by representing to him that the State would drop Counts I and III in exchange for his pleading guilty to Count II when Counts I and III had already been dismissed. The defendant also alleges that the plea offer resulted from "collaboration between the [p]ublic [d]efender and the State."

Although not explicitly listed in our Rules of Appellate Procedure as an appeal as of right provided under Tennessee Rule of Appellate Procedure 3, our supreme court has held that a defendant may appeal the denial of a motion to withdraw a guilty plea. *See State v. Peele*, 58 S.W.3d 701, 703 (Tenn. 2001) (holding that a direct appeal lies from the denial of a Rule 32(f) motion under Tennessee Rules of Criminal Procedure). Generally, a defendant who submits a guilty plea is not entitled to withdraw the plea as a matter of right. *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995). The decision to allow the withdrawal of a guilty plea is within the discretion of the trial court and may not be overturned on appeal absent an abuse of discretion. *Henning v. State*, 184 Tenn. 508, 511, 201 S.W.2d 669, 670 (1947); *State v. Davis*, 823 S.W.2d 217, 220 (Tenn. Crim. App. 1991).

Rule 32(f) of the Tennessee Rules of Criminal Procedure governs the withdrawal of a guilty plea prior to the judgment becoming final. According to the rule, a trial court may permit the withdrawal of a guilty plea upon a showing "of any fair and just reason" before it sentences the defendant. Tenn. R. Crim. P. 32(f)(1). Once the defendant is sentenced and before the judgment becomes final, however, a trial court may permit the withdrawal of a guilty plea only "to correct manifest injustice." *Id.* 32(f)(2).

Trial courts and appellate courts must determine whether manifest injustice exists on a case-by-case basis. *See State v. Crowe*, 168 S.W.3d 731, 741-42 (Tenn. 2005); *Turner*, 919 S.W.2d at 355. To determine whether the defendant should be permitted to withdraw his guilty plea

to correct manifest injustice, a court must scrutinize carefully the circumstances under which the trial court accepted the plea. An analysis of the plea submission process under Tennessee Rule of Criminal Procedure 11(b) facilitates an inquiry into the existence of manifest injustice. *See generally State v. McClintock*, 732 S.W.2d 268 (Tenn. 1987) (for rules concerning acceptance of guilty pleas). Tennessee courts have allowed the withdrawal of guilty pleas to prevent manifest injustice when

> (1) the plea "was entered through a misunderstanding as to its effect, or through fear and fraud, or where it was not made voluntarily"; (2) the prosecution failed to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 . . . (1963), and this failure to disclose influenced the entry of the plea; (3) the plea was not knowingly, voluntarily, and understandingly entered; and (4) the defendant was denied the effective assistance of counsel in connection with the entry of the plea.

Crowe, 168 S.W.3d at 742 (footnotes omitted). Further, manifest injustice may be found where the State's prosecutor has induced the plea through "gross misrepresentation." *Turner*, 919 S.W.2d at 355. Courts have also found that manifest injustice resulted from the trial court's failure to advise a defendant of the appropriate sentencing range, to apply the appropriate sentencing statute, or to inform a defendant of the consequences flowing from the guilty plea. *State v. Antonio Demonte Lyons*, No. 01C01-9508-CR-00263, slip op. at 23-24 (Tenn. Crim. App., Nashville, Aug. 15, 1997). A guilty plea, however, should not be allowed to be withdrawn merely because the defendant has had a change of heart. *Crowe*, 168 S.W.3d at 743; *Ray v. State*, 224 Tenn. 164, 170, 451 S.W.2d 854, 856 (1970).

Lastly, we note that the concept of manifest injustice under Rule 32(f) is not identical to the requirements of constitutional due process; however, when "there is a denial of due process, there is a 'manifest injustice' as a matter of law." *Davis*, 823 S.W.2d at 220 (quoting *United States v. Crusco*, 536 F.2d 21, 26 (3d Cir. 1976)). "[A] trial court may, under some circumstances, permit the withdrawal of a guilty plea to prevent manifest injustice even though the plea meets the 'voluntary and knowing' requirements of constitutional due process." *Antonio Demonte Lyons*, slip op. at 16.

In the present case, the defendant moved to set aside his guilty plea after sentencing but before the judgment became final. The timing of the motion, therefore, invoked the manifest injustice rule, *see* Tenn. R. Crim. P. 32(f)(2), and the defendant has the burden of establishing that a plea of guilty should be withdrawn to prevent manifest injustice. *Turner*, 919 S.W.2d at 355.

The defendant argues that manifest injustice resulted from the defendant's lack of understanding of his plea and ineffective assistance of counsel. *See Crowe*, 168 S.W.3d at 742 (holding that withdrawal of a plea to correct manifest injustice is warranted when "the plea was not knowingly, voluntarily, and understandingly entered" and when "the defendant was denied the effective assistance of counsel in connection with the entry of the guilty plea"). The trial court did not abuse its discretion in holding that the defendant failed to establish that manifest injustice resulted from his acceptance of the plea agreement.

We cannot agree with the defendant's argument that he misunderstood his plea. The trial court thoroughly questioned the defendant on his understanding of his rights and his plea agreement. Although the defendant alleges that he was "rushed" into accepting the plea offer, the court committed time and effort to ensure that the defendant had given proper discernment to his plea. The trial court also correctly noted the defendant's level of education and that the case had been pending in court for two years. In light of these facts, the trial court did not err in finding that the defendant understood the consequences of his plea and that he entered his plea voluntarily and knowingly.

We further cannot agree with the defendant that he established counsel's ineffectiveness in advising him of the plea. Generally, to establish ineffective assistance of counsel, the defendant must establish both that the services rendered or the advice given were below "the range of competence demanded of attorneys in criminal cases," *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that such inadequate services created deficiencies that "actually had an adverse effect on the defense." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067 (1984). The prosecutor explained that defense counsel worked diligently out of court to secure the plea bargain and the dismissal of two of three counts pending against the defendant. Considering that a toxicology report reflected that the defendant's blood contained oxycodone four times that of the therapeutic range, the result of a trial would not have likely aided the defendant. The defendant received a sentence near the mandatory minimum as a result of his plea, and the record does not reflect that a more lenient outcome was probable. Under these circumstances, we cannot say that counsel was ineffective in "rushing" the defendant to a favorable plea deal.

The defendant makes bare assertions that the prosecutor threatened to prosecute him to the full extent of the law on all three counts if he did not plead guilty to the DUI charge and that the district attorney and public defender "colluded" in the plea. However, no evidence exists suggesting that either tactic was used. The defendant's testimony during the motion hearing never mentioned misleading tactics by the prosecutor. Although he testified that he felt "badgered" by the assistant district attorney and his counsel to accept the plea, his allegations did not reach the grounds of collusion. Moreover, the defendant's trial counsel was his legal representative and advocate in the process, and counsel had the authority if not duty to confer with the prosecutor concerning settlement of the case. The trial court acted within its discretion in determining that these allegations did not lead to manifest injustice.

II. Procedural Failure of Accepting Defendant's Plea

The defendant next argues that the trial court erred by "accepting a guilty plea wherein the [defendant] did not make an announced 'best interest' plea and wherein the [defendant] made no factual allocution."

He argues that because he maintained his innocence at the plea hearing and did not enter a "best interests" plea, *see North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970), the court should not have accepted his plea. An *Alford* plea, commonly referred to as a "best interests" plea, results when a defendant pleads guilty despite his "protestation of innocence" when that defendant has "intelligently concluded that his interests required entry of a guilty plea and the record

before the judge contained strong evidence of actual guilt." *Dortch v. State*, 705 S.W.2d 687, 688 (Tenn. Crim. App. 1985). The record before us shows that the defendant effectually made an *Alford* plea, although his guilty plea was not explicitly recognized as such. The record reflects that the defendant believed he was innocent, but he acknowledged the likelihood of losing at trial. The record shows that the defendant rationally considered the outcome of his trial in pleading guilty:

> THE COURT: . . . I'm not saying a jury would find you guilty or not guilty. All I'm saying is if they found you guilty, I think assuming what has been said, and I have no reason to doubt what [the prosecutor] has told me about what his proof would be --
>
> THE DEFENDANT: Right.
>
> THE COURT: -- but I think there would be sufficient grounds depending on what the officers saw and so forth that a jury could convict you. Now, they might not --
>
> THE DEFENDANT: Right.
>
> THE COURT: -- but we don't know.
>
> THE DEFENDANT: Right. That's why I've agreed to the plea.

The defendant does not cite any authority suggesting that a court cannot consider an *Alford* plea without explicitly stating the nature of the plea. The record shows that the court exhaustively questioned the defendant as to the consequences of his plea. The trial court did not err in entering judgment on the defendant's plea.

Secondly, the defendant argues that the trial court failed to determine a factual basis for his guilty plea. Rule 11(b)(3) of the Tennessee Rules of Criminal Procedure mandates that the court shall determine a factual basis for a plea before entering judgment on the guilty plea. The record before us clearly shows a factual basis for the plea. Defense counsel agreed to the State's representation of the facts of the case, which explained that the defendant drove erratically, that he appeared impaired, and that the blood test showed the presence of intoxicants. Under these circumstances, the trial court had more than adequate factual grounds to accept and enter judgment on the defendant's guilty plea.

III. Conclusion

In light of the foregoing analysis, we hold that no manifest injustice attends the defendant's guilty plea to DUI and that adequate factual grounds supported the entry of the judgment of conviction. We affirm the judgment of the trial court.

JAMES CURWOOD WITT, JR., JUDGE